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Supreme Court of the United States

October Term, 1951

No. 255

STERLING L. HICKS, *Petitioner*,

v.

STATE OF NORTH CAROLINA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

CLAUDE L. DAWSON
MARVIN L. RITCH
HOWARD J. MCGRATH
Attorneys for the Petitioner.

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, and the appellant below, prays that a writ of certiorari issue to review the judgment and the opinion of the Supreme Court of the State of North Carolina entered in the above case on May 2, 1951. (R. 125)

OPINIONS BELOW

The Mecklenburg Superior Court in which the case was tried did not render an opinion. The opinion of the Supreme Court of the State of North Carolina is set forth in the record [R. 125-133].

JURISDICTION

The opinion and judgment of the Supreme Court of the State of North Carolina was rendered on May 2, 1951. Jurisdiction of this Court is invoked under Title 28 Section 1257 of the Judicial Code of the United States. The time in which to file a petition for certiorari was extended in accordance with the rules of this Court to August 30, 1951, by order of the Chief Justice signed on July 27, 1951. [R. 133]

Jurisdiction of this Court is involved under Section 1 of the 14th Amendment to the Constitution of the United States, the particular provision reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The jurisdictional question arises from the record itself, showing the failure of the Courts of North Carolina to afford to the Petitioner due process of law. The particular matters which are complained of relate primarily to the failure of the Courts of North Carolina to apply the provisions of the Constitution of North Carolina, namely Section 17 of the Constitution of that State, which reads as follows, to wit:

> "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

The Courts of the State of North Carolina have held that this constitutional prohibition applies to a person being tried twice for the same offense (*State v. Mansfield,* 207 N. C., 233, 176 S. E. 761).

The provisions of the Constitution of North Carolina conform to the 5th Amendment to the Constitution of the United States, which reads as follows:

> "No person shall be held to answer to a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Petitioner contends that he was acquitted in a trial and the indictment charging the same crime of which he now stands convicted and that his conviction now affirmed by the Supreme Court of North Carolina is for the same identical crime or offense for which he had previously been acquitted. This defense of double jeopardy was fully pleaded at the commencement of trial on the indictment for which he now stands convicted. The question was fully and completely raised prior to the commencement of the last trial, as will be shown by the record in this case, pp. 5 to 9, inclusive.

The Trial Court not only denied the Petitioner's plea of double jeopardy, but refused to tender to the jury any issues thereunder, and further refused to permit the Petitioner to offer evidence in the support of his plea of former acquittal or former jeopardy (R. 9).

The allegations of the indictment on which the Petitioner had been acquitted, and the allegations of the indictment on which he now stands convicted, will be hereafter referred to, and the Petitioner respectfully submits that the indictments in question were identical in their

allegations, and that the same evidence and the same testimony that was submitted to the Court and the jury in the trial now complained of was the same evidence and the same testimony given in a previous trial in which he had been acquitted of the same offense.

The record in the case shows that not only the question of double jeopardy was raised at the trial that the Petitioner now stands convicted, but that exception was duly taken to the refusal of the Court to apply the principles of former jeopardy, the refusal of the Court to hear testimony or to submit the issues to the jury on the question of double jeopardy (R. 9).

In this connection, the attention of this Court is invited to the record relating to the plea of double jeopardy. The Petitioner was tried on March 20, 1950 in the Superior Court of Mecklenburg County, North Carolina, on an indictment No. 15772 which read as follows: [R. 6]

> "The Jurors for the State upon their oath present, that: Chesley Morgan Lovell and Sterling L. Hicks, late of the County of Mecklenburg, and other person or persons to the State unknown, on the 12th day of January, 1950, and prior thereto, with force and arms, at and in the County aforesaid did wilfully, unlawfully and feloniously combine, conspire, confederate, and plan together amongst themselves each with the other and with each other, to wilfully and maliciously and wantonly injure and damage a building owned by the Jefferson Standard Broadcasting Company, which said building was then and there in actual use by said Jefferson Standard Broadcasting Company for business purposes, by the use of dynamite and other high explosives, against the form of the statute and in such case made and provided and against the peace and dignity of the State."

He was also tried on an indictment No. 15-773 set forth on page 7 of the record as follows:

"The Jurors for the State upon their oath present, that: Chesley Morgan Lovell and Sterling L. Hicks, late of the County of Mecklenburg, and other person or persons to the State unknown, on the 12th day of January 1950, and prior thereto, with force and arms, at and in the County aforesaid, did wilfully and unlawfully combine, conspire, confederate, and plan together amongst themselves each with the other and with each other, to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company against the form of the statute in such case made and provided and against the peace and dignity of the State.

And the Jurors for the State upon their oath further present, that: Chesley Morgan Lovell and Sterling L. Hicks, late of the County of Mecklenburg, and other person or persons to the State unknown, on or about the 12th day of January 1950, and prior thereto, with force and arms, at and in the County aforesaid, did wilfully, unlawfully, and feloniously combine, conspire, confederate, and plan together amongst themselves, each with the other and with each other, to wantonly and wilfully injure the personal property of the Jefferson Standard Broadcasting Company, to-wit: radio broadcasting equipment, against the form of the statute and in such case made and provided and against the peace and dignity of the State."

The Petitioner, on March 20, 1950, was acquitted under indictment 15,772 (R. 6) and the Trial Court at the same time sustained a motion for non-suit as to indictment 15,773, which is set forth on page 7 of the record.

The Petitioner asserts that his acquittal on indictment 15,772, and a non-suit at the close of all the evidence at the same trial on indictment 15,773 (R. 7), effectively disposed of any criminal charges which might or could have been brought against the petitioner thereafter. The indictment upon which the Petitioner was tried and now

found to be guilty (R. 5-6), is identical in form and language with the indictments under which he had been previously acquitted or non-suited, with the exception as to the allegation as to the ownership of the property in question. The first indictment alleged that the Petitioner did wilfully, unlawfully, and feloniously combine, conspire, confederate, and plan together amongst themselves, each with the other and with each other, to wantonly and wilfully injure and damage a building owned by the Jefferson Standard Broadcasting Company. The difference between the two indictments under which the Petitioner was tried and acquitted, and the State was non-suited, was only the allegation as to the ownership of the property.

It is admitted that the conspiracy was against the same property, the only defect being the question of ownership, and no question of ownership was raised under indictment 15,772 at the prior trial. There was but one alleged offense, to-wit, a conspiracy, and the Petitioner has definitely been acquitted of that offense.

The law is firmly established that where an act constitutes several crimes, there may be separate prosecutions for each crime, but the state cannot split up a single crime and prosecute it in parts. A prosecution of any part of a single crime bars further prosecution based upon a whole or part of the same crime (16 C J p 270 and cases cited). This is the law of North Carolina (*State* v. *Fayettesville,* 6 N. C. 371). It is also a general rule of law, such as in the case of larceny offenses, that the larceny of several articles at one and the same time constitutes an indictable offense, and conviction or acquittal of the larceny of any one or more of them is a bar to a subsequent prosecution for the larceny of the others (16 C J 270 par. 248).

Where the accused has once been placed on trial in a court competent to try the offense of the character

charged, and the jury, having once rendered a verdict of not guilty as to said offense, the state can never place him on trial again for the same offense, no matter how irregular the proceedings have been. (22 C. J. S. p 402, par. 268; 16 C J 255) and this is likewise the law of North Carolina (*State* v. *Jesse*, 20 N. C. 95).

The Petitioner has been convicted of the identical crime of which he had previously been acquitted. There was but one alleged conspiracy and the evidence and proof were the same and identical under the indictments for which the Petitioner now stands convicted as it was under the indictments in which he was acquitted. (See the case of *Short* v. *U. S.*, 91 Fed. 2d 614 4th CCA, 112 A L R 969). In that case, Circuit Judge Parker discussed the law applying to former jeopardy in conspiracy cases, and it was held that the Government can split up the conspiracy into different indictments and prosecute all of them, but that the prosecution for any part of a single crime bars any further prosecution based upon a whole or a part of the same crime (*Murphy v. U. S.*, 285 Fed. 801, 816; *in re Snow*, 120 U. S. 274, 30 L. Ed. 658, 16 C J 270).

The views expressed in the above opinions have the recent approval of this Court (*Sealfon* v. *U. S.* 332 U. S. 575, 92 L Ed. 180). This Court, in the case just cited, reversed the conviction in a conspiracy case and among other things said:

> "It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. * * * Thus, with some exceptions, one may be prosecuted for both crimes. * * * But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings * * * and operates to conclude those matters in issue which the verdict determined though the offenses be different. * * * The basic facts in each trial were

identical. As we read the records of the two trials, petitioner could be convicted of either offense only on proof that he wrote the letter pursuant to an agreement with Greenberg. Under the evidence introduced, petitioner could have aided and abetted Greenberg in no other way. Indeed, respondent does not urge that he could. Thus the core of the prosecutor's case was in each case the same; the letter, and the circumstances surrounding it and to be inferred from it, and the false invoices. There was, of course, additional evidence on the second trial adding detail to the circumstances leading up to the alleged agreement, petitioner's participation therein, and what he may have gotten out of it. But at most this evidence only made it more likely that petitioner had entered into the corrupt agreement. It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do."

It is clear from the foregoing that the Courts of North Carolina by having convicted and later affirmed the present conviction of the Petitioner, failed to accord to the Petitioner that due process which is required under the 14th Amendment to the Constitution of the United States. The Courts of North Carolina not only refused or failed to apply the plea of former jeopardy under the Constitution of North Carolina, but clearly failed and refused to follow the decisions applicable to the double jeopardy under which the Petitioner had rights which should have been protected by the Courts.

While the Petitioner did not specifically say at the time that the plea of double jeopardy was filed and the proof in support of it was offered, that the failure of the Court to permit the plea was in violation of the due process clause of the 14th Amendment to the Constitution of the United States, the point was effectively raised, and does arise by the very nature of the facts so pleaded and the constitutional question involved in the Petition

on Writ of Certiorari arises from the record itself made in the Trial Court. The constitutional question is not hidden in the record, as in the case of *Whitney* v. *California* (274 U. S. 357, 71 L Ed 1095) which arose on a Writ of Error, and this question is being raised by Petition for Certiorari, in which this Court has a right to search the entire record (*First National Bank* v. *Anderson* 269 U. S. 341, 70 L Ed p 295).

The Petitioner, a layman, should not have his constitutional rights frittered away because the counsel on which he relies failed to add in the record "in violation of the 14th Amendment".

The second question that Petitioner raises as to due process of law as required by the 14th Amendment, arises from the conduct of the trial at which he was convicted. In reviewing this question, the Court should bear in mind that there had been a lockout of employees by the Jefferson Standard Broadcasting Company, in Charlotte, North Carolina; that the Petitioner and other members of the Union, who had been discharged from their employment, had set up a picket line around the property of the Jefferson Standard Broadcasting Company; that there was considerable feeling in the City of Charlotte, North Carolina, in this matter, which had been publicized in the press, and which, generally, the people of the community were fully apprised of; that the Petitioner, Sterling L. Hicks, was charged by the conspiracy to have procured the services of one Lovell to destroy the property of the Jefferson Standard Broadcasting Company, which was situated on property owned by the Duke Power Company. Naturally, there was considerable resentment among the people of Charlotte, North Carolina, as to the dastardly crime which was charged against the petitioner.

The Petitioner, therefore, asserts that the prosecuting attorney in the trial of the case should have avoided any

questions, statements, or arguments which would inflame the jury and prejudice the Petitioner against obtaining a fair trial.

The record in this case conclusively shows that the prosecuting attorney did not adopt that policy. During the trial the prosecuting attorney asked questions which he, as a lawyer, knew had no relation to the crime which was charged against the Petitioner, and which by no stretch of the imagination were proper questions or evidence, even if the prosecuting attorney had evidence to support such improper questions. The conduct of the prosecuting attorney was reprehensible and not only was his conduct objected to, but it was condoned by the Court in practically every instance. Let us examine some of the things that happened at the trial, all of which was duly excepted to by counsel for the Petitioner.

The principal witness against the Petitioner was one Lovell who, the State contended, the Petitioner had conspired with to dynamite the property in question. It is claimed that the Petitioner went to Columbia, South Carolina, and made a deal with Lovell to destroy the property of the broadcasting company. The evidence conclusively shows that Lovell admitted that he did not know the Petitioner prior to the time he was contacted in Columbia, allegedly on January 12, 1950, and it is claimed that one week later Lovell was called by a man who gave his name as Vernon Hicks, and informed that he had some dynamite hidden for him over by a sign board at a place called Jimmy's. Lovell had previously testified that he could not swear that it was Hicks' voice he heard over the telephone (R. 13), but he was permitted, over objection of Petitioner's counsel, to state as his opinion as to whose voice he heard over the telephone, and then stated the opinion that it was the voice of Mr. Hicks. The Petitioner has consistently denied that he ever saw Lovell prior to the preliminary hearing

in his case, and made no deal with him whatsoever. Lovell testified that he found the dynamite at the place where he says the person who called him on the telephone told him that it would be found (R. 15), but there was not a scintilla of evidence that Petitioner had ever seen the dynamite, that he knew anything about it, or that he had placed it where Lovell had found it.

The prosecuting attorney brought in the dynamite to which were attached no dynamite caps, but exhibited dynamite caps which were never identified by anybody. [R. 21-22]

There was no testimony in the record in any way connecting the dynamite caps which were exhibited to the witness Lovell with the charge against the Petitioner. The obvious purpose of the offer of such dynamite caps was to prejudice the Petitioner before the jury.

The witness Squires testified as to a conversation he overheard between the Petitioner in the presence of a Mr. Stroup and a Mr. Helker. This conversation took place in July, 1949, months before the alleged conspiracy was entered into on January 12, 1950, and the Petitioner is alleged to have then said "We will bankrupt them or blow the hell out of them" [R. 29]. No connection was shown between this conversation and the charge which was filed against the Petitioner, and was denied by the Petitioner and by all other witnesses.

The Prosecuting Attorney in his cross examination of the Petitioner (R. 40-41), questioned the Petitioner about having worked in a radio station in Birmingham, Alabama, before he came to Charlotte. He testified that he knew a Mr. William Bochman, former manager of the radio station at Columbia, South Carolina. The following question was asked:

> "Q I'll ask you if, in the course of your negotiations, if you didn't tell Mr. Bochman that if he felt

as he told you he felt about settling with your men, that you would not be responsible for what happened, and if, that very night, the Station wasn't knocked off the air," by sabotage?"
Objection by defendant—overruled.
EXCEPTION NO. 39 (R. 40)

The answer was made as follows:

"I did not tell Mr. Bochman anything of the kind. And furthermore, I was not handling the negotiations with Mr. Bochman at that time. I was in conference with Mr. Morris, who was the International representative handling the negotiations. I did not say anything to him."

And Petitioner was asked a question as follows:

"Q I ask you if you don't know, that the very day that you talked to Mr. Bochman, that that Radio Station was "knocked off the air" that night, by cutting the wire—or other damage to it?" [R. 41]

The answer was made as follows:

"I do not."

The record shows the following:

"I did not have any contact with Radio Station WABB in Mobile, Alabama. I do not know that Radio Station WABB was knocked off the air. I know a man by the name of Harry Clippard in Columbia. I did not go to Columbia, South Carolina, on January 12, 1950 and see this man Harry Clippard. Clippard is no longer connected with the Radio Station. He runs a Radio Repair Shop near the heart of the City of Columbia. I did not go to Clippard and have him point out to me some man that I could get to do this damage to WBT. I haven't seen Clippard since May 1948. I know a man by the name of Paul Cramm, now Chief Engineer for Radio Station WAGA in Atlanta, Ga." [R. 41]
"Q Why, I'll ask you if you don't know that you and Paul Cramm were in Mobile, Alabama, at Radio Station WABB when they were having labor diffi-

culties, and if you did not participate in putting sulphuric acid in the conduits at that Station and "throw it off the air"?"

Objection by defendant—overruled. [R. 41]

"A I did not. I was not in Mobile with Mr. Cramm. I know him. I would say he is a friend of mine."

"Q What other places have you been with Cramm?"

Objection of defendant—overruled.

"A I've been nowhere with Mr. Cramm. Mr. Cramm originally came from Birmingham. He was working with WSGM. He was a member of the same Local Union that I was. I haven't seen Cramm since I left Birmingham.'

"Q Well, now I will ask you if you don't know that at the time that you were employed at WBT that you and your friend Richardson, and others didn't wire up the office of the General Manager of WBT—Mr. Crutchfield in order that you could stay in another part of the Station or Studio and hear everything that went on in the office?"

Objection by defendant—overruled. [R. 42]

"A I would like to say—I'll answer the question and then say something: No, I did not, because I was working nine miles from the Studio. I worked at the transmitter. I came into the Studio and met there with Mr. Crutchfield and the others. I was not getting any information from Richardson."

"Q You mean to say that your man Richardson did not tell you what he was hearing from that office?"

Objection by defendant—overruled.

"A No. I didn't terminate my employment with WBT. I didn't quit working there. The last time I worked there was September 3, 1949. I can identify the photostatic copy of the letter that you hand me."

"Q Did you sign that letter and is that your signature?"

Objection by defendant—overruled. [R. 42]

"A It is."

"Q When was that letter written and by whom was it written?"

Objection by defendant—overruled.

"A It was written August 6, 1949."

"Q Were you employed by W B T at that time?" Objection by defendant—overruled. [R. 43]
"A I was."
"Q Now, I'll ask you if you didn't write to the Federal Communications Commission under date of August 6, 1949, the following letter: 'Federal Communications Commission, New Postoffice Building, Washington 25, D. C. Gentlemen: The citizens of Charlotte have been looking with anticipation for several months to the coming of television in this area. However, it is here, BUT IN NAME ONLY. In talking to various dealers of the television receivers, we find that they, as well as the general public, are much disappointed in the type and quality of programs being broadcast by the local television outlet; and too, the dealers have stocked their showrooms with television receivers, but are unable to move them, due to the fact that the general public is complaining about the program material now being presented. We feel that the local outlet is not utilizing the full facilities as granted in the license. We therefore respectfully request, unless they take advantage of the situation, that the television channel be granted to someone who will. Sincerely yours, S. L. Hicks, Business Manager, Local Union No. 1229, International Brotherhood of Electrical Workers. Carbon copies to Southern Radio Corporation, R. C. A. Service Company, Chapman and Wilhelm Company, and Southern Hardware Company.' Now, did you write and sign that letter?" Objection by defendant—overruled. [R. 43]
"A I did."
"Q I'll ask you if you did not also send duplicate copies of that letter to Southern Radio Corporation, R. C. A. Service Company, Chapman & Wilhelm Company, and Southern Hardware Company, and other dealers in the television receivers and broadcasting equipment, and advertisers on Radio Station WBT?" Objection by defendant—overruled. [R. 44]
"A I only sent it to four dealers in television receivers."
"Q Weren't they all advertisers on WBT also?" Objection by defendant—overruled. [R. 44]
"A I don't think so."

"Q Do you mean to say you don't think the Southern Radio Corporation was advertising its RCA equipment on that Station?"
Objection by defendant—overruled.
"A Not at that time." [R. 44]
"Q I will ask you if you don't know that they had a regular program on that Station around 6 or 6:30 in the evening, called "Twilight Time" or something like that, every day?"
Objection by defendant—overruled. [R. 44]
"A I can't say."
"Q Now, at the very time you wrote this letter and mailed it to these business firms in the City of Charlotte, you were drawing your pay check every week from the Radio Company that you were trying to get the Government to take the franchise from, weren't you?"
Objection by defendant—overruled. [R. 44-45]
"A State that Question again."
Thereupon the Court Reporter reads the question.
"A Not while I wrote the letter, I wasn't." [R. 45]
"Q You mean to tell this jury that you were not working for Radio Station WBT on August 6, 1949 when you wrote that letter?"
Objection by defendant—overruled. [R. 45]
"A Iwas not on their payroll at the time I wrote the letter; I was on my own time."
"Q But who was paying your salary?" [R. 45]
Objection by defendant—overruled.
"A They were paying me while I worked, but I wrote that letter on my own time."
"Q When did you work?"
Objection by defendant—overruled.
"A I worked regular schedules. [R. 45]
I worked eight hours a day for five days a week and was working for WTB. WTB was paying me for the hours that I put in. I believe it was $117.00 a week at that time."
"Q And you now say, then, that the only feeling of duty or loyalty that you owed to WBT was during the forty hours a week that they paid you for?"
Objection by defendant—overruled.
"A I do." [R. 45]

The Court will note that each and every question, improper in form and substance, that was asked the Petitioner by the Prosecuting Attorney, related to matters in no way connected with the charge for which the Petitioner was then being tried. The question that was asked the Petitioner by the Prosecuting Attorney if he had a radio station knocked off the air, did not relate to the radio station of the Jefferson Standard Broadcasting Company, nor did the indictment relate in any way to Station WABB, in Mobile, Alabama, in which the Prosecuting Attorney by inference placed before the jury the incriminating statement that the Petitioner participated in putting sulphuric acid in the conduits at that station and threw it off the air. Furthermore, all these improper questions were asked by the Prosecuting Attorney and objected to by Petitioner's counsel but in every instance the Trial Court overruled the objections and permitted the Petitioner to answer the questions. The Petitioner was even asked about a letter he wrote to the Federal Communications Commission on August 6, 1949. This letter was written by the Petitioner as Business Manager of Local Union 1229 of the International Brotherhood of Electrical Workers, shown on page 43 of the Record, and an attempt was made to show that this letter was sent to various advertisers on WBT, and that Petitioner was at the same time working for Station WBT and receiving $117.00 a week, and the Prosecuting Attorney, over objection of counsel for the Petitioner, further brought out prejudice against the Petitioner by questioning his loyalty to the company for which he was working (R. 45).

Counsel for the Petitioner asserts that he knows no rule of law by which such evidence would be admissible, and if a court could be found other than Courts in North Carolina which have approved the reprehensible conduct of the Prosecuting Attorney, this Court certainly would not follow any such precedents.

It is submitted that it was highly improper and reprehensible for counsel acting in bad faith to make statements and ask questions merely to prejudice his opponent's case for the jury.

64 C J par. 258, p 244, *Starr* v. *Southern Cotton Oil Company*, 81 S E 766, 165 N. C. 587.

Massey v. *Alstone* 91 S E 964, 173 N. C. 215.

While it is realized questions on the admissibility of evidence are matters to be decided by the State Courts, as this Court held in *Moore* v. *Dempsey*, 261 U. S. 86, 67 L Ed 543, the prohibition against a review for failure to accord due process is a matter for this Court under the 14th Amendment.

This Petitioner is about to be deprived of his liberty without due process of law by a proceeding which was a trial only in form and not in substance.

Moore v. *Dempsey*, 261 U. S. 86, 67 L Ed 543, 43 S Ct 265.

Hill v. *Texas*, 316 U. S. 400, 86 L Ed 1559 62 S Ct 1159.

Chambers v. *Florida*, 309 U. S. 227, 84 L Ed 716, 60 S Ct 472.

People v. *Becker*, 210 NY 274, 104 N E 396.

Hickory v. *United States*, 160 U. S. 408, 40 L Ed. 474, 16 S Ct 327.

Minner v. *United States* (CCA 10th) 57 Fed. 2d 506.

Weare v. *United States* (CCA 8th 1 F (2d) 617.

Mooney v. *Holohan*, 294 US 103, 79 L Ed 791, 55 S Ct 340.

People v. *Walsh*, 262 NY 141, 186 NE 422.

In the case of *Buchwalter* v. *State of N. Y.*, 319 U. S. 427, 87 L Ed. 1492, this Court said that the due process clause of the 14th Amendment requires action by a State

through any of its agencies to be consistent with the fundamental principles of liberty and justice. Those principles are applicable in all the States and do not depend upon or vary with local legislation.

Castillo v. *McConnico,* 168 U. S. 674, 682, 683, 42 L. ed, 622, 624, 625, 18 Sup. Ct. Rep. 229.

West v. *Louisiana,* 194 U. S. 258, 261-263, 48 L. Ed. 965, 968, 969, 24 Sup. Ct. Rep. 650.

Patterson v. *Colorado,* 205 U. S. 454, 459, 51 L. ed. 879, 880, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689.

Pullman Company v. *Knott,* 235 U. S. 23, 25, 59 L. ed. 105, 110, 35 Sup. Ct. Rep. 2.

Enterprise Irrigation Dist. v. *Farmers Mutual Canal Co.,* 243 U. S. 157, 166, 61 L. ed. 644, 649, 37 Sup. Ct. Rep. 318.

It can hardly be assumed that the asking of questions which intimated that the Petitioner was guilty of other crimes which had no connection with the charge against him, was consistent with the fundamental principles of liberty and justice. Where this requirement has been disregarded in a criminal trial in a State Court, this Court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantees.

Buchwalter v. *State of New York, supra.*

The Petitioner submits that the question of whether the Petitioner in the trial of the charge against him received due process of law, is a matter arising under the 14th Amendment, and that this constitutional right was raised by his counsel by objecting to the conduct of the prosecuting attorney, the introduction of evidence, and the questions asked the witnesses, which prejudiced the rights of the Petitioner before the jury and placed him in a most unfavorable light.

The Petitioner asserts that this Court in the interest of right and justice, and particularly where the Peti-

tioner's rights have been so flagrantly violated, should take jurisdiction to review the case on the Petitioner's Petition for Certiorari. It should not be necessary for this Petitioner to go again to the Supreme Court of North Carolina and raise his constitutional objections to his trial and conviction by a writ of habeas corpus. This would only delay the administration of justice, and the Petitioner, an innocent man who has been successfully "framed" by the perjury of the State's witnesses, should have immediate relief from the void judgment of conviction against him.

For the reasons herein stated, this Court should take jurisdiction of this case, first, upon the ground that due process has not been accorded to the Petitioner by his conviction of a crime of which he had already been acquitted, and second, by the trial which he received and the conduct of the prosecuting attorney who obtained a conviction only by prejudicing the Petitioner before the jury. This alleged trial took place in the United States of America, and not in the Soviet Union.

The Supreme Court of North Carolina has in all things affirmed the conviction of the Petitioner and at this point of time no further relief may be expected from the Courts of North Carolina.

QUESTIONS PRESENTED

This case involves the question of whether the Courts of North Carolina have complied with the Fourteenth Amendment to the Constitution of the United States by affording to the Petitioner that due process of law as required by this Amendment to the Constitution of the United States.

The Petitioner contends that he is about to be deprived of his liberty without due process because of the failure of the Courts of North Carolina to properly apply the Constitution of that State which provides that no person may be tried for the same offense after an acquittal, and that this violates not only the Constitution of North Carolina but also the Fifth Amendment to the Constitution of the United States. That the Petitioner has twice been placed in jeopardy. The Petitioner further contends that the trial he had at which he was convicted he was not accorded due process of law. That he did not receive a fair trial as he was entitled to receive under the Fourteenth Amendment to Constitution of the United States.

STATEMENT OF FACTS

At the January 8, 1951, Regular Criminal Term of Mecklenburg Superior Court in the State of North Carolina, a bill of Indictment was returned by the Grand Jury against the Petitioner which charged that the Petitioner conspired with one Chesley Morgan Lovell to "maliciously commit damage and injury to and upon the real property of the Duke Power Company. The Indictment was in two counts as follows: (R. 2)

(First Count)

> "The Jurors for the State upon their oath present, that: Sterling L. Hicks late of the County of Mecklenburg on the 12th day of January, 1950, and prior thereto and thereafter with force and arms, at and in the County aforesaid did wilfully and unlawfully combine, conspire, confederate and plan with one Chesley Morgan Lovell, and with other persons to the State unknown, to maliciously commit damage and injury to and upon the real property of Duke Power Company, against the form of the statute in such cases made and provided and against the peace and dignity of the State:

(Second Count)

And the Jurors for the State upon their oath FURTHER PRESENT, that Sterling L. Hicks late of the County of Mecklenburg, on the 12th day of January, 1950 and prior thereto and thereafter, with force and arms, at and in the County aforesaid did wilfully and unlawfully combine, conspire, confederate and plan with one Chesley Morgan Lovell, and with other persons to the State unknown, to wantonly and wilfully and maliciously injure the personal property of Duke Power Company, to wit: electrical transformers and other equipment of said Duke Power Company, said property being situate and located upon and near the property of the Jefferson Standard Broadcasting Company against the form of the statute and in such case made and provided and against the peace and dignity of the State."

The case was called for trial during the week of January 22, 1951, and upon the call for trial the Petitioner filed a plea to the Indictment of "Plea of former acquittal or former jeopardy. (R. 5-6-7-8-9)

This plea of former acquittal or former jeopardy was predicated upon the acquittal of the Petitioner on an Indictment charging the same offense as was charged in the Indictment for which he was being tried. The Petitioner was tried on Indictment No. 15-772 on March 20, 1950 (R. 6) and was acquitted. At the same time on March 20, 1950, the Court non-suited the State on Indictment No. 15-773. (R. 7).

The only difference between the Indictment on which the Petitioner was placed on trial on January 22, 1951, and the Indictments No. 15-772, and No. 15-773, on which the Petitioner had been acquitted, and the State non-suited are the allegations as to the ownership of the property. The owners in the first Indictments were referred to as the Jefferson Standard Broadcasting Company, and the last Indictments as the Duke Power Company.

Counsel for the Petitioner requested that the issue of whether the Petitioner had been acquitted of the charge for which he was being tried be submitted to the jury (R. 8-9). Attention was directed to the Judge of the Superior Court that the same evidence and the same witnesses would be used to prove the charge of the Indictments as had been produced at the trial at which the Petitioner had been acquitted. The Court refused to submit the issue to the jury, and then overruled the plea of former jeopardy. (R. 9).

The case then proceeded to trial and resulted in a verdict of guilty on both counts of the Indictment. From this verdict and judgment of the Superior Court, an appeal was taken, and the judgment has been in all things affirmed by the Supreme Court of North Carolina. (R. 125-133).

REASONS FOR GRANTING THE WRIT

The Petitioner asserts that a writ of certiorari should be granted under subdivision (a) of Paragraph 5, of Rule 38 of this Court in that the Supreme Court of North Carolina has decided a federal question of substance namely the question of double jeopardy and due process of law in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States. The State of North Carolina by the decisions of its courts has denied to the Petitioner his liberty without due process of law.

The particular grounds for the assertion of this question is briefed in this petition under the heading of "Jurisdiction."

ARGUMENT AND BRIEF

This petition for certiorari raises a constitutional question arising under the Fourteenth Amendment to the Constitution of the United States. The attention of the Court is directed to the authorities cited and compiled in the section of this petition relating to the jurisdictional question, and it is not deemed necessary to again repeat the authorities cited there. The authorities herein cited are in addition to the authorities cited under the jurisdictional question.

The right not to be put in jeopardy a second time for the same cause is as important as the right of trial by jury. Accordingly there will be found in the Constitution of the United States, and in the Constitution of the various States a provision that no person shall for the same offense be twice put in jeopardy. This is only a recognition of the common law rule. A plea of double jeopardy is therefor good either under the Constitution or the common law. The legislature cannot deprive citizens of this constitutional right.

American Juris. Vol. 15, Par. 360, pp. 40-41

This protection is afforded not only against the peril of second punishment but against being again tried for the same offense.

Stroud v. *United States* 251 U. S. 15, 64 L. Ed. 103 American Juris. Vol. 15, pp. 40, and cases cited under foot note 18.

If the Constitutional and common law right of not being placed in double jeopardy cannot be destroyed by the legislative bodies of the various States by the same analogy it would seem that the such rights cannot be destroyed by judicial decisions.

The Supreme Court of North Carolina has ruled that a citizen cannot be placed twice in jeopardy.

State v. *Bell,* 205 N. C. 225, 171 S. E. 50.

Yet in this case the same Supreme Court rules that the Petitioner may again be placed in jeopardy. The Petitioner was already acquitted of the offense of which he now stands convicted.

The Petitioner was indicted on a conspiracy charge. The law is well settled that where the acts charged are all included within one conspiracy there may be only one lawful prosecution. There can be only one prosecution for a conspiracy which violates a number of statutes.

American Juris Vol. 15, par. 383, p. 59, and cases cited.

In many jurisdictions if a minor offense is embraced within a higher crime as a constituent element or component part and on the trial of the higher offense there could be conviction of the minor offense, or an acquittal will bar a prosecution for the higher crime.

This appears to be the law of North Carolina.

State v. *Bell, supra.*

In the case of *Short* v. *United States* 91 Fed. 2d 614, 112 ALR 562, cited in the authorities under the jurisdictional question the law on double jeopardy in conspiracy cases has been carefully collected and cited by the Distinguished Jurist Parker of the United States Court of Appeals for the Fourth Circuit. If the authorities cited in the Short case are followed it is crystal clear that the plea of double jeopardy filed on behalf of this Petitioner should have been sustained by the Courts of North Carolina.

The Petitioner has already pointed out that the only difference between the indictment under which he was con-

victed, and the one under which he was acquitted relate to the ownership of the property. The indictment charged that the Petitioner conspired to commit damage to property, this property was properly identified in the Indictment when the Petitioner was acquitted.

The ownership of the property is not important. It was not even necessary to state the owners of the property but only to describe the property.

People v. *Robertson* 284 Ill. 620, 120 N. E. 539, 31 C. J. 732.

It is an established maxim of the common law in the administration of criminal justice, constantly recognized by elementary writers and courts of judicature from a very early period down to the present time that a man shall not be brought into danger of his life or limb for one and the same offense more than once.

8 R. C. L. 134, 135.

State v. *McJimsey* 80 N. C. 377, 30 Am. Rep. 90.

This rule against double jeopardy long established at common law prohibits a second punishment for the same offense, but it goes much further and holds a second trial for the same offense whether the accused had suffered punishment or not, and whether in the former trial he has been convicted or acquitted.

Kepner v. *United States* 195 U. S. 100, 49 L. Ed. 114. See annotations in 45 LRA. (NS) 60.

The second point raised by the petitioner relates to the conduct of the trial at which he was convicted by the jury. The failure to accord the Petitioner a fair trial raises a question under the Fourteenth Amendment to the Constitution. Petitioner invites the Court's attention to the many authorities cited under the jurisdictional question in this petition, and it is not deemed necessary to recite the many violations of proper conduct by the prosecuting

attorney in attempting, and actually bringing before the jury matters which were in no way connected with the offense for which the Petitioner was being tried.

The trial was a travesty on justice.

The Petitioner respectfully submits that since his constitutional rights have been violated this Court should assume jurisdiction in this case to prevent a serious miscarriage of justice. The question of whether the Petitioner's constitutional rights have been violated arise from the record itself. Counsel for the Petitioner in the Courts below objected to the violation of Petitioner's constitutional rights raising the points thereby but did not use the technical words of under the Fourteenth Amendment. It is respectfully submitted that this Court should look to the substance and not to the form where Constitutional questions arise, and as in this case where the Constitutional questions have in fact been raised but not citing the Fourteenth Amendment in name nevertheless by reason of fairness and justice and overlooking technicalities jurisdiction should be taken. If the Petitioner is to be denied his Constitutional rights simply because his counsel did not add the words "in violation of the Fourteenth Amendment" after proper objection which apprised the lower courts of the question then jurisdiction would be limited to form and not substance. The petition for a writ of certiorari should be granted.

CONCLUSION

WHEREFORE, the Petitioner prays that a writ of certiorari may issue under the Seal of this Honorable Court in this Cause directed to the Supreme Court of North Carolina, and that upon a review the judgment of the Supreme Court of North Carolina be vacated, reversed, and set aside, and this cause remanded to that Court with instructions to proceed further in accordance with the views of this Court.

CLAUDE L. DAWSON
MARVIN L. RITCH
HOWARD J. MCGRATH
Attorneys for the Petitioner.

FILED
SEP 8 1951
CHARLES ELMORE CROPLEY
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In The

Supreme Court of the United States

October Term, 1951

No. 253

STERLING L. HICKS,
Petitioner,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

Brief of the State of North Carolina, Respondent, Opposing Petition for Writ Of Certiorari

HARRY McMULLAN,
Attorney General

RALPH MOODY,
Assistant Attorney General

Counsel for the State of North Carolina, Respondent.

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In The

Supreme Court of the United States

October Term, 1951

No. 255

STERLING L. HICKS,
Petitioner,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

Brief of the State of North Carolina, Respondent, Opposing Petition For Writ Of Certiorari.

STATEMENT OF THE CASE

The Petitioner, Sterling L. Hicks, seeks, by writ of *certiorari*, to have the Supreme Court of the United States review a decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Mecklenburg County, North Carolina, imposing sentence upon the Petitioner based upon a conviction of the crime of conspiracy to maliciously commit damage and injury to real property and of the crime of conspiracy to wantonly, willfully and maliciously injure personal property, these being conspiracies to commit offenses prohibited by the North Carolina statutes. The opinion of the Supreme Court of North Carolina was filed May 2, 1951, and is reported as STATE v. STERLING L. HICKS, 233 N. C. 511, 64 S.E. (2d) 871. (See Appendix, p. 19, where opinion of Supreme Court of North Carolina is set out in full.)

FACTS

At the March Term, 1950, of the Superior Court of Mecklenburg County, Sterling L. Hicks and Chesley Morgan Lovell were tried upon two consolidated bills of indictment. The first indictment, No. 15,772, charged that Hicks and Lovell, and other persons unknown, conspired to willfully and maliciously injure a building owned by the Jefferson Standard Broadcasting Company in violation of § 14-50 of the General Statutes. (See Appendix, p. 14.) The other indictment, No. 15,773, contained two counts. In the first count, it was alleged that Hicks and Lovell conspired to violate § 14-127 of the General Statutes (See Appendix, p. 14) by maliciously committing damage and injury on the real property of the Jefferson Standard Broadcasting Company. The second count in this indictment alleged that Hicks and Lovell conspired to commit the crime prohibited by § 14-160 of the General Statutes (See Appendix, p. 14) by wantonly and maliciously injuring the personal property of the Jefferson Standard Broadcasting Company.

This trial, held in the Superior Court of Mecklenburg County at the March Term, 1950, resulted as follows: Lovell pleaded guilty to the consolidated indictments and was sentenced to prison. A jury trial was held as to the Petitioner, Sterling L. Hicks, and the jury found the Petitioner Hicks not guilty upon indictment No. 15,772. The judge sustained a motion for judgment as of nonsuit at the close of the evidence as to the second count in indictment No. 15,773. This is equivalent to a verdict of not guilty. The jury found the Petitioner Hicks guilty on the first count in indictment No. 15,773, the same being the count charging a conspiracy to damage the real property of the Jefferson Standard Broadcasting Company which is a conspiracy to violate § 14-127 of the General Statutes.

The Petitioner appealed this conviction to the Supreme Court of North Carolina, and the Supreme Court of North Carolina held that there was a fatal variance between the allegations of the count upon which Hicks was convicted

and the proof. Briefly, the Court said that the conspiracy charged was to maliciously commit damage and injury upon the real property of the Jefferson Standard Broadcasting Company, whereas the proof was to the effect that they conspired to maliciously commit damage and injury to the property of the Duke Power Company. The opinion of the Supreme Court of North Carolina in this case is reported as STATE v. STERLING L. HICKS and CHESLEY MORGAN LOVELL, 233 N. C. 31, 62 S.E. (2d) 497. (See Appendix, p. 15, where the opinion of the Supreme Court of North Carolina in this case is set out in full.) The case as to these indictments, therefore, was reversed, the Supreme Court of North Carolina, among other things, saying: "The motion for a judgment as of nonsuit should have been allowed with leave to the Solicitor to secure another bill of indictment, if so advised."

At the January, 1951, Regular Term of the Superior Court of Mecklenburg County, the Petitioner Hicks was again indicted on a bill of indictment containing two counts. The first count charged that the Petitioner Hicks and Lovell and others conspired to commit damage and injury to the real property of the Duke Power Company. The second count contained the same allegations as to conspiracy except it was charged that in this instance, the Petitioner and Lovell conspired to willfully and maliciously injure personal property of the Duke Power Company. (R. 2)

Before the Petitioner Hicks was tried the second time, that is, at the January, 1951, Term of the Superior Court of Mecklenburg County, and before pleading to the bill of indictment, the Petitioner entered a plea of former acquittal or former jeopardy which appears on R. 5, 6, 7, 8, and 9. Briefly, it will be seen that the Petitioner sets out his indictments in the previous trial and relates what happened to these indictments. He also sets out the indictment on which he was to be tried in the second trial but contends that these were identical offenses and that the same identical evidence would have to be used to convict him. He said, therefore, that his acquittal at the former trial of

indictment No. 15,772 operated as an acquittal as to the charges contained in the bill of indictment returned against him at the January, 1951, Criminal Term of Mecklenburg County. (R. 8) The Petitioner tendered issues to be submitted to the jury, which the judge refused to submit, and the Petitioner's plea of former acquittal or former jeopardy was overruled, the Court holding as a matter of law that such defenses or pleas could not be sustained. (R. 9)

ARGUMENT

I.

THE DENIAL OF PETITIONER'S PLEA OF FORMER JEOPARDY DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a State Court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by States.

BARRON v. BALTIMORE, 7 Pet. 243
U. S. v. LANZA, 260 U. S. 377, 67 L. ed. 314

The Petitioner's brief thus presents no question for decision under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

U. S. v. RAGEN, (1950; C.C.A. 7), 181 F. (2d) 1001
AMRINE v. TINES, (1942: C.C.A. 10), 131 F. (2d) 827
Compare: PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288
MAXWELL v. DOW, 176 U. S. 581, 44 L. ed. 597

In U. S. v. RAGEN, *supra,* it is said, at p. 1003:

> "The only right under the federal Constitution of which the petitioner in the case at bar claims to be deprived is his right to be protected from double jeopardy. The sole specific reference in the United States Constitution to what is usually referred to as 'double jeopardy' is in the Fifth Amendment: '*** nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;***.' But the Fifth Amendment is not directed to the States and applies only to offenses against, and trials under, the laws of the United States. Palko v. State of Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288; Phillips v. McCauley, 9 Cir., 92 F.2d 790.
>
> * * * * * * *
>
> "The Supreme Court has considered the question whether the right granted in the Fifth Amendment to be not twice placed in jeopardy for the same offense is within the scope of the due process clause of the Fourteenth Amendment. In Palko v. State of Connecticut, 302 U.S. 319, 323, 58 S.Ct. 149, 151, 82 L.Ed. 288, the court stated: 'We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.'
>
> "The court then held that the claimed double jeopardy there being considered was not a violation of the due process clause."

In AMRINE v. TINES, *supra,* it is said, at p. 833:

> "And, unlike the fundamental right to assistance of counsel granted by the Six Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a State Court, the Petitioner's plea of former jeopardy could only have raised questions concerning rights guaranteed him by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the Petitioner was not twice placed in jeopardy for the same offense in contravention of the North Carolina Constitution. Compare WHITE v. TEXAS, 310 U. S. 530. The decision on this point was, therefore, a decision of a State Court with respect to a question arising under the Constitution of the State. Such a question, the United States Supreme Court cannot review.

CRANE v. CAMPBELL, 245 U. S. 304, 62 L. ed. 304
DAVIS v. OHIO, 241 U. S. 565, 60 L. ed. 1172
GRAHAM v. WEST VIRGINIA, 224 U. S. 616, 56 L. ed. 917

In North Carolina, it is held that where the accused himself secures a reversal or procures the indictment to be quashed, he cannot, when subsequently indicted, assert anything under the former indictment and cannot avail himself of any defense based on the former trial.

STATE v. DRAKEFORD, 162 N. C. 667, 78 S.E. 308

In STATE v. DRAKEFORD, *supra,* the Court said:

"The court properly overruled the plea of former jeopardy. The names might well have been held *idem sonans,* or, at the most, an immaterial variance, and the former trial should have proceeded. S. v. LANE, 80 N. C., 407; S. v. COLLINS, 115 N. C., 716, and numerous instances there collected; 29 Cyc., 272-277; 21 A. and E. (2d Ed.), 313-316.

"But the prisoner having been discharged on the former trial at his own instance, cannot now avail himself of this defense. In 12 Cyc., 266, it is said: 'Where the accused has secured a decision that an indictment is void, or has procured its being quashed, or has been

granted an instruction based on its defective character, directing the jury to acquit, he is estopped, when subsequently indicted, to assert that the former indictment was valid,' citing U. S. v. JONES, 31 Fed., 725; JOY v. STATE, 14 Ind., 139; S. v. MEEKINS, 41 La. Ann., 543.

"On the same page, 12 Cyc., 266, it is further said: 'If the accused is acquitted by the direction of the court on the ground of material variance, he cannot plead the acquittal as a bar, for he has never been in jeopardy, and when tried on a new indictment, the crime then alleged is not the same as in former indictment. And it has been held that if the accused on the prior trial maintained that the variance was material, and the court directed a verdict of acquittal on that ground, he cannot subsequently on his plea of former acquittal allege or prove that it was not material,' citing very many cases which sustain this proposition; among them, S. v. BIRMINGHAM, 44 N. C., 120; S. v. REVELS, *ib.*, 200; S. v. SHERRILL, 82 N. C., 694."

See also STATE v. CRISP, 188 N. C. 799, 125 S.E. 543.

It is believed that the rulings of this Court in this respect are in accord with those of the State Court.

U. S. v. BALL, 163 U. S. 62, 41 L. ed. 300
STROUD v. U. S., 251 U. S. 15, 64 L. ed. 103

It is the established authority in the jurisdiction of North Carolina that no jeopardy attaches where there is a fatal variance in the bill of indictment.

STATE v. MILLER, 231 N. C. 419, 57 S.E. (2d) 392
STATE v. DRAKEFORD, 162 N. C. 667, 78 S.E. 308
STATE v. SHERRILL, 82 N. C. 694
Compare: STATE v. BEAL, 202 N. C. 266, 162 S.E. 561
STATE v. CORRELL, 229 N. C. 640, 50 S.E. (2d) 717

It will be seen that the Supreme Court of North Carolina (STATE v. STERLING L. HICKS, 233 N. C. 511, 516, 64

S.E. (2d) 871), in construing its own substantive law, decided (1) the Petitioner did not aver any facts outside the record showing the identity of the crimes charged in the former indictments with those described in the warrant upon which the Petitioner was tried, and (2) it would not avail the Petitioner because if he had offered evidence outside of the record in order to support his plea, the evidence of a conspiracy to damage or injure property owned or used by the Duke Power Company would not support a conviction of a conspiracy to damage or injure property owned or used by the Jefferson Standard Broadcasting Company.

II.

THERE IS NO CONSTITUTIONAL OR FEDERAL QUESTION INVOLVED AS TO THE CONDUCT OF THE PROSECUTOR, THE TYPE OF QUESTIONS PROPOUNDED TO THE WITNESSES OR AS TO THE COMPETENCY OF THE EVIDENCE ON THE TRIAL.

The Petitioner complains because of what he alleges to be the improper and reprehensible conduct of the prosecuting attorney on the trial and what the Petitioner contends is his bad faith in making statements and asking questions.

An examination of the record will show that no exception was made and presented to the State Supreme Court on the conduct of the prosecutor as a separate exception or assignment of error. The prosecuting officer did cross-examine the Petitioner as to various matters that occurred at other radio stations (R. 40, 41, 42, 43, 44, 45) and as to statements the Petitioner had made, as well as a letter sent to the Federal Communications Commission on August 6, 1949 (R. 43), signed by the Petitioner as Business Manager of the Local Union. The State Court considered all of these exceptions and decided that the questions propounded by the prosecuting officer were proper and competent under State law, saying: "The Solicitor did not transgress legal proprieties in undertaking to impeach the

defendant as a witness by cross-examining him as to antecedent acts of misconduct. S. v. KING, 224 N. C. 329, 30 S.E. (2d) 230."

Objections to the competency or relevancy of evidence in a State Court involve the application either of the general or local law of evidence and, as such, furnish no ground for review or interposition by this Court.

BUCHALTER v. NEW YORK, 319 U. S. 427, 87 L. ed. 1492
ADAMSON v. CALIFORNIA, 332 U. S. 46, 67 S. Ct. Rep. 1672, 1679
LIZENBA v. CALIFORNIA, 314 U. S. 219, 227, 86 L. ed. 166
BARRINGTON v. MISSOURI, 205 U. S. 483, 51 L. ed. 890
SHERMAN v. GRINNELL, 144 U. S. 198, 36 L. ed. 403
BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454

Under State law, it was competent for the State of North Carolina, in the prosecution of the Petition, to inquire into other incidents at other radio stations to determine the scope of the conspiracy, and it was competent to show independent collateral events or crimes of the same nature for the purpose of showing intent, design or plan, and conspiracy itself is one of the cases which, under the North Carolina authorities, falls within the exception to the general rule.

STATE v. SUMMERLIN, 232 N. C. 333, 337, 60 S.E. (2d) 322
STATE v. STANCILL, 178 N. C. 683, 100 S.E. 241
STATE v. DAIL, 191 N. C. 231, 131 S.E. 573
STATE v. BATTS, 210 N. C. 659, 188 S.E. 99
PEOPLE v. STEVENS, 248 P. 696, 700 (Cal.)
HELZER v. PEOPLE, 68 P. (2d) 543, 552 (Col.)
STATE v. CONTINENTAL PURCHASING CO., 195 A. 827, 831 (N. J.)
ALLSBROOK v. COMMONWEALTH, 50 S.W. (2d) 22, 24 (Ky.)

BANNING v. U. S., 130 Fed. (2d) 330, 337
JOHNSTON v. U. S., 22 Fed. (2d) 1, 4, 5
WALKER v. U. S., 93 Fed. (2d) 393, 394
DEVOE v. U. S., 103 Fed. (2d) 584, 589

The answer to all of these objections is that they were questions of local State law and were passed upon by the Supreme Court of North Carolina, and no Federal question can be predicated upon its ruling. An inspection of the record will show that no Federal question was raised nor was any exception or assignment of error predicated upon a violation of the Fourteenth Amendment. Any alleged violation of the Federal Constitution was not even briefed or debated in the Supreme Court of North Carolina, and the Supreme Court of North Carolina has not passed upon any such question from a viewpoint of the Federal Constitution. No alleged violation of the Fourteenth Amendment is set forth in the record, assignments of error or the brief filed by the Petitioner. It is said by the Petitioner that he was "framed" by the perjury of the State's witnesses. There is no evidence of any such conduct. The State's witness, Lovell, who testified against the Petitioner, had already entered a plea of guilty to his part in the conspiracy and as to his part in the overt acts committed and had already received sentence to the State's Prison. (R. 11, 12) No exception was presented to the Supreme Court of North Carolina on the question of perjured evidence or on the conduct of the prosecuting attorney aside from the competency of evidence and the questions propounded. Even if the evidence were perjured, which on this record is specifically denied by the State, there is no evidence that the prosecuting officer knew of such fact or had any part in the matter. The Supreme Court of North Carolina did not pass upon any constitutional question involving the Fourteenth Amendment in regard to these contentions which are now asserted for the first time.

III.

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE PETITIONER FAILED TO SET UP A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES IN THE STATE COURTS.

Although an attempt has been made to show that the questions set out in the Petition for writ of *certiorari* are not Federal questions or are not of sufficient substance and importance to justify the allowance of the writ, the State of North Carolina also contends that this Court is without jurisdiction to allow the Petition, for the Petitioner failed to set up any of these questions *as questions arising under the Constitution of the United States* in the State Courts.

Careful examination of the record will show that, although the Petitioner took exceptions to alleged errors of law, he failed entirely to set up specially any rights, privileges, or immunities claimed under the Constitution of the United States in either the trial court or the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina (Appendix, p. 19) treats the exceptions taken by the Petitioner as raising questions of State law only. No Federal questions are mentioned. The Petition for writ of *certiorari* filed in this Court omits any allegation that Federal questions were set up as such in the State Courts.

The Petitioner admits on R. 8 and 9 of his brief that at the time the plea of double jeopardy was filed, no specific constitutional violation of the Fourteenth Amendment was asserted aside from the fact that the plea was made at all, and the Petitioner impliedly admits that no allegation was made or asserted that he had been deprived of constitional rights under the Fourteenth Amendment. The Petitioner's only contention is that the question was impliedly raised and that such question arises from the record itself. The Supreme Court of North Carolina certainly did not know that it was passing upon a question involving the Four-

teenth Amendment and did not pass upon any such question at all.

Under the statute authorizing review by *certiorari* of decisions of the highest Courts of the several States, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges, or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed."

28 U.S.C. 1940 ed., Sec. 344

The rights, privileges, or immunities must be set up in the State Courts.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454
HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722

CONCLUSION

The Petitioner quotes § 17 of the Constitution of the State of North Carolina as follows:

> "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

The Petitioner then cites STATE v. MANSFIELD, 207 N. C. 233, 176 S.E. 761, as holding that this constitutional prohibition applies to a person being tried twice for the same offense.

The only statement in STATE v. MANSFIELD, *supra*, which bears on the subject is as follows: "It is a fundamental principle that a person cannot be tried twice for the same offense, and a plea of former acquittal or conviction is a good plea. S. v. CLEMMONS, *post;* Const. of N. C., Art. 1, § 17; Const. of U. S., Amendment V."

It is, therefore, by no means certain that this point was expressly decided as the MANSFIELD case went off on other grounds. We have already referred to the record in

this case as showing that no Federal question was presented on the Fourteenth Amendment, and we are now referring to the brief filed by the Petitioner in the Supreme Court of North Carolina at the Spring Term, 1951, in the case of STATE v. STERLING L. HICKS, No. 505, and we refer to this brief and make it a part of our Appendix, and we are having copies of this brief certified to the Supreme Court of the United States by the Clerk of the Supreme Court of North Carolina. An examination of this brief will show that no constitutional question was presented from a Federal viewpoint. It will further show that no constitutional question was presented from a Federal viewpoint as to the conduct of the prosecuting officer, perjured testimony or as to the Petitioner being "framed."

The cases cited by the Petitioner on the question of double jeopardy, such as SEALFON v. U. S., 332 U. S. 575, 92 L. ed. 180, for the most part deal with the subject of double jeopardy in cases arising in the Federal Court. For example, in the SEALFON case, the question went off on the proposition of *res adjudicata.* The plea of double jeopardy was abandoned. Of course, there is no question about the application of the Fifth Amendment to cases arising in the Federal Courts.

The questions set out in the Petition are not Federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. None of these questions were set up in the State Courts as questions arising under the Constitution of the United States. Therefore, the writ of *certiorari* should be denied.

Respectfully submitted,

HARRY McMULLAN,
Attorney General

RALPH MOODY,
Assistant Attorney General,

Counsel for the State of North Carolina, Respondent.

APPENDIX

§ 14-50, General Statutes of North Carolina:

Conspiracy declared a felony; punishment.—If any two or more persons shall conspire to willfully and maliciously injure any person, or any building in actual use for residential or business purposes or customarily devoted to any such use or any contents thereof, by the use of nitroglycerine, dynamite, gunpowder, or other high explosive, each and every one so conspiring shall be guilty of a felony, and on conviction shall be punished by imprisonment in the state prison for not less than two years and not more than fifteen years.

§ 14-127, General Statutes of North Carolina:

Malicious injury to real property.—If any person shall maliciously commit any damage, injury or spoil upon any real property whatsoever, either of a public or private nature, for which no punishment is provided by any existing law, every person so offending shall be guilty of a misdemeanor: Provided, that nothing herein shall extend to any case where the party trespassing or doing the injury acted under a fair and reasonable belief that he had a right to do the act complained of, nor to any trespass, not being willful and malicious, committed in hunting, fishing or the pursuit of game. When the owner, or one of the owners, of an estate in possession shall complain of the injury before a justice of the peace of the county in which the offense is charged to have been committed before the regular term of the superior court next after the commission of the offense, and shall fail to state in his complaint that the damage exceeds ten dollars, the punishment, upon conviction of the offense, shall not exceed a fine of fifty dollars or imprisonment for thirty days.

§ 14-160, General Statutes of North Carolina:

Malicious injury to personal property.—If any person shall wantonly and willfully injure the personal property

of another, he shall be guilty of a misdemeanor, whether the property be destroyed or not, and shall be punished by fine or imprisonment, or both, in the discretion of the court.

STATE v. STERLING L. HICKS and CHESLEY MORGAN LOVELL.

(Filed 13 December, 1950)

APPEAL by defendant STERLING L. HICKS from BENNETT, SPECIAL JUDGE, March Extra Criminal Term, 1950, of MECKLENBURG.

Criminal action tried upon two bills of indictment, one of which charged Sterling L. Hicks and Chesley Morgan Lovell with conspiring to damage a building owned by the Jefferson Standard Broadcasting Company, by the use of dynamite or other high explosive; and the other charged them with conspiring "to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company," and "to wantonly and willfully injure the personal property of the Jefferson Standard Broadcasting Company, to-wit: Radio Broadcasting equipment."

The defendant Chesley Morgan Lovell pleaded guilty to the charges as contained in both bills of indictment.

In apt time the Solicitor made a motion to consolidate the cases for the purpose of trial, and it was so ordered.

The State offered the defendant Lovell as a witness, who testified that he was introduced to the defendant Hicks on Main Street, in Columbia, S. C., about 5:30 p.m., on 12 January, 1950, and that Hicks said he had a job for him; that when he inquired as to the nature of the job, Hicks said, "We will talk some other place." They then went to a cafe in West Columbia. "We . . . talked for two or three minutes and he started telling me about the plans, showed me how to get into W-B-T tower. He first wanted me to 'throw' the tower. By throwing the tower I mean to cut the guy-lines from No. 3 tower. But he said there was a house in range of it, and it might fall on the house, and I

said I didn't want no part of it. Then he said we could blow up the transformer . . . . Hicks asked me what I would charge to do the job, and I told him it would be worth $250.00 and he would have to give me some transportation—that I didn't have any car or money. He said 'How much transportation money would it take'? and I said 'Around $25.00,' and he gave me $25.00 and left, and I didn't see him any more. . . . Hicks agreed to pay me when the job was finished. He said he was affiliated with the Brotherhood—some union. Hicks said if we could get the transformer knocked out, we could put pickets around it, and keep electricians from going in there to repair it."

The State offered evidence by other witnesses tending to show that the defendant Hicks was in Columbia on the above date, making inquiry about the defendant Lovell, and that Lovell was located, and Hicks and Lovell went to the cafe in West Columbia, where the defendant Lovell testified the agreement was made. The defendant Lovell further testified that he received a telephone call on 19 January, 1950, from a man he thought to be Hicks. "He told me where the dynamite was hid, and I picked it up."

According to Lovell, he visited the premises of the Jefferson Standard Broadcasting Company on Friday night, the 20th, but didn't "like the looks of the place, with the tower all lit up, so I hid the dynamite in the woods and went back to Columbia." On the following night, "I went and got the dynamite—and I went towards the tower with it; and the 'law' hollered at me and I threw it down and ran. . . I got access to the tower by cutting the barbwire fence."

On cross-examination Lovell testified, "I do not say that upon a payment of $25.00 I made these two or three trips to Charlotte for the purpose of trying to blow up the W-B-T tower. I was not to blow up the tower—it was the transformer, not the tower. The transformers are not within the fence that encloses the tower. They are to one side . . . I was going to stick the dynamite under the transformer and light the fuse and leave." The witness admitted he had a criminal record and was on probation at the time

he was arrested in connection with the present charges.

Evidence was offered by the State to the effect that the entire property of the Broadcasting Company, consisting of 19 acres, was enclosed by four strands of barbed wire, and that there was an individual fence approximately five feet high and fifty feet square around each of three towers located on the property; and that the gate to each of these enclosures is kept locked, as required by the Federal Communications Commission.

M. J. Minor, Chief Engineer of the Broadcasting Company, testified: "There is a transformer, or power mat, west of the transmitter building, approximately 150 feet from the building. This is not Jefferson Standard property; the property belongs to the Duke Power Company, and its purpose is to serve the Jefferson Standard Broadcasting Company."

At the close of the State's evidence, the appellant interposed a demurrer to the evidence and moved for judgment as of nonsuit. The demurrer was overruled and the motion denied.

Hicks then testified in his own behalf and denied that he was in Columbia, S. C., on 12 January, 1950, or at any other time since May, 1948. He denied having talked with Lovell, and testified he had never seen him prior to the preliminary hearing on 23 February, 1950. Approximately a dozen witnesses testified they talked with the defendant Hicks in Charlotte on 12 January, 1950. And according to the testimony of seven or eight of these witnesses, they talked with him between 5:30 and 9:00 p.m., on the above date. Certain documentary evidence was also introduced, which tended to corroborate the testimony of the defendant Hicks and his witnesses in this respect. He also offered evidence of his good character.

The motion for judgment as of nonsuit was renewed at the close of all the evidence, and was sustained as to the count charging a conspiracy to injure personal property.

The jury returned a verdict of not guilty as to the charge of conspiracy to damage a building owned by the Jefferson

Standard Broadcasting Company, but "Guilty of conspiracy to damage real property."

From the judgment entered on the verdict, the defendant Hicks appeals and assigns error.

ATTORNEY-GENERAL McMULLAN AND ASSISTANT ATTORNEY-GENERAL MOODY FOR THE STATE.

RALPH V. KIDD AND J. C. SEDBERRY FOR DEFENDANT STERLING L. HICKS.

DENNY, J. The appellant assigns as error the failure of the trial judge to sustain his demurrer to the evidence and allow his motion for judgment as of nonsuit interposed at the close of the State's evidence, and renewed at the close of all the evidence. This assignment of error is bottomed on the contention that there is a fatal variance between the charge in the bill of indictment upon which the appellant stands convicted and in the proof submitted to the jury.

The only evidence offered by the State, tending to establish a conspiracy to maliciously damage property, was the testimony of the defendant Lovell, who entered a plea of guilty and was used as a witness for the State. Lovell testified that he was employed by Hicks for a consideration of $250.00 to blow up the transformer. There is no evidence of an agreement to damage the real property of the Jefferson Standard Broadcasting Company. The transformer, or power mat, which serves the Broadcasting Company, according to the State's evidence, is not the property of the Jefferson Standard Broadcasting Company, but, on the contrary, is the property of the Duke Power Company.

In the case of S. v. MASON, 35 N. C. 341, RUFFIN, C. J., in speaking for the Court, said: "In indictments for injuries to property it is necessary to lay the property truly, and a variance in that respect is fatal." S. v. HILL, 79 N. C. 656; S. v. SHERRILL, 81 N. C. 550.

In the last cited case the defendant and others were indicted for trespass upon the premises of one Harris, where-

as the evidence revealed that the trespass was upon the premises of one Lewis. This was held to be a fatal variance.

There is a fatal variance between the indictment and the proof on this record. The indictment charges the defendants with conspiring to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company. The proof is to the effect that they conspired to maliciously commit damage and injury to the property of the Duke Power Company. S. v. NUNLEY, 224 N. C. 96, 29 S.E. 2d 17; S. v. CORPENING, 191 N. C. 751, 133 S.E. 14; S. v. HARBERT, 185 N. C. 760, 118 S.E. 6; S. v. GIBSON, 169 N. C. 318, 85 S.E. 7; S. v. DAVIS, 150 N. C. 851, 64 S.E. 498.

The question of variance in a criminal action may be raised by motion for judgment as of nonsuit, or by demurrer to the evidence. S. v. LAW, 227 N. C. 103, 40 S.E. 2d 699; S. v. GRACE, 196 N. C. 280, 145 S.E. 399; S. v. HARRIS, 195 N. C. 306, 141 S.E. 883; S. v. HARBERT, *supra;* S. v. GIBSON, *supra.*

The motion for judgment as of nonsuit should have been allowed with leave to the Solicitor to secure another bill of indictment, if so advised. S. v. LAW, *supra;* S. v. JACKSON, 218 N. C. 373, 11 S.E. 2d 149; S. v. GIBSON, *supra.*

Reversed.

STATE v. STERLING L. HICKS.

(Filed 2 May, 1951.)

APPEAL by defendant from CLEMENT, J., and a jury, at the January Term, 1951, of MECKLENBURG.

Criminal prosecution for conspiracy tried upon a two-count indictment.

The first count alleges that the defendant conspired "with Chesley Morgan Lovell and other persons to the State unknown" to violate G. S. 14-127 by maliciously committing damage and injury upon the real property of the Duke Power Company, and the second count charges that the defendant conspired "with Chesley Morgan Lovell and other persons to the State unknown" to commit the

misdemeanor denounced by G. S. 14-160 by wantonly and willfully injuring the personal property of the Duke Power Company, to wit: "electrical transformers and other equipment of said Duke Power Company . . . located upon and near the property of the Jefferson Standard Broadcasting Company."

The events set forth in the next two paragraphs antedated the trial on the present indictment.

The defendant and Chesley Morgan Lovell made personal appearances at the March Term, 1950, of the Superior Court of Mecklenburg County to answer two consolidated indictments numbered respectively 15,772 and 15,773. Indictment 15,772 charged that the defendant "and Chesley Morgan Lovell and other persons to the State unknown" committed the felony denounced by G. S. 14-50 by conspiring "to wilfully and maliciously injure . . . a building owned by the Jefferson Standard Broadcasting Company, which said building was then and there in actual use by said Jefferson Standard Broadcasting Company for business purposes, by the use of dynamite and other high explosives." Indictment 15,773 contained two counts. The first count alleged that the defendant "and Chesley Morgan Lovell and other persons to the State unknown" conspired to violate G. S. 14-127 by maliciously committing damage and injury upon the real property of the Jefferson Standard Broadcasting Company, and the second count averred that the defendant "and Chesley Morgan Lovell and other persons to the State unknown" conspired to commit the misdemeanor defined by G. S. 14-160 by wantonly and wilfully injuring the personal property of the Jefferson Standard Broadcasting Company.

Lovell pleaded guilty to the consolidated indictments, and was sentenced to imprisonment. A jury trial was had as to the defendant, who denied guilt. Virtually the same testimony was adduced by both the prosecution and defense at the March Term, 1950, as was presented by them at the trial now under review. The presiding Judge acquitted the defendant upon the second count in indictment 15,773 under G. S. 15-173 by sustaining his motion for a

compulsory nonsuit thereon at the close of all the evidence; the jury found the defendant not guilty upon indictment 15,772; and the jury convicted the defendant upon the first count in indictment 15,773, i.e., the count charging a conspiracy to damage the real property of the Jefferson Standard Broadcasting Company. The defendant appealed to this Court from the judgment pronounced against him on the verdict upon the last mentioned count, and won a reversal here solely on the ground that there was a fatal variance between the allegations of that count and the proof. This Court said: "There is a fatal variance between the indictment and the proof on this record. The indictment charges the defendants with conspiring to maliciously commit damage and injury to and upon the real property of the Jefferson Standard Broadcasting Company. The proof is to the effect that they conspired to maliciously commit damage and injury to the property of the Duke Power Company . . . The question of variance in a criminal action may be raised by motion for judgment as of nonsuit, or by demurrer to the evidence . . . The motion for judgment as of nonsuit should have been allowed with leave to the Solicitor to secure another bill of indictment, if so advised." SEE: S. v. HICKS, *ante*, 31, 62 S.E. 2d 497. After the decision of this Court in the former action was certified to the Superior Court, the present indictment was returned by the grand jury.

Before pleading to the present indictment, the defendant filed a plea of former acquittal, setting forth indictments 15,772 and 15,773 and the present indictment and the result of the former trial, and concluding from these matters that the crimes described in the present indictment are identical with those charged against him in indictments 15,772 and 15,773 and that by reason thereof his acquittal upon those indictments constitutes a bar to the present prosecution. The defendant tendered these two issues; (1) Has the defendant been formerly acquitted of the charge contained in the first count of the present bill of indictment? (2) Has the defendant been formerly acquitted of the charge contained in the second count of the present

bill of indictment? He prayed the court to submit the issues to the jury before the submission of the general issue of guilt, and to allow him to offer evidence before the jury on the trial of the issues to establish the identity of the two counts in the present indictment with the offenses charged in the previous indictments. Judge Clement "refused to submit to the jury the two issues tendered by the defendant . . . , and . . . held, as a matter of law, that there was no former acquittal or former jeopardy involved in this case." The defendant reserved exceptions to the rejection of his plea of former acquittal, and pleaded not guilty to the indictment.

The action was then tried on the merits before a petit jury.

The case made out by the State's testimony is summarized in the next two paragraphs.

The Jefferson Standard Broadcasting Company operates Radio Station WBT, which has offices in the City of Charlotte and a transmission station in a rural section of Mecklenburg County. The transmission station is located on a 19 acre tract owned by the Broadcasting Company, and is operated by means of electric power transmitted to it by the Duke Power Company through a transformer substation situated on the same land at a distance of 730 feet from the transmission station. The transformer substation is maintained and operated by the Duke Power Company, which placed it upon the 19 acre tract under a written contract binding the Jefferson Standard Broadcasting Company and specifying that the four transformers are the property of the Duke Power Company.

The defendant, a resident of Charlotte and a discharged employee of the Jefferson Standard Broadcasting Company, made several statements prior to 12 January, 1950, indicating that he entertained ill will for the Broadcasting Company and desired to put Radio Station WBT out of business. On the late afternoon of that day, he and Chesley Morgan Lovell made an agreement at Jimmy's Cafe near Columbia, South Carolina, whereby Lovell agreed to "blow up the transformers" at the transformer substation on the

19 acre tract and whereby defendant agreed to pay Lovell $250.00 for so doing. Seven days later the defendant caused a supply of dynamite to be concealed behind a signboard near Jimmy's Cafe, and notified Lovell of that fact by telephone. Lovell took the dynamite into his possession and carried it from South Carolina to Mecklenburg County, North Carolina, where he entered upon the 19 acre tract under cover of darkness on the night of 21 January, 1950, for the purpose of dynamiting the transformers pursuant to his agreement with the defendant. He was apprehended by peace officers with the dynamite as he approached the transformers, and for that reason was unable to accomplish his object.

The defendant offered evidence tending to show that he was not acquainted with Lovell and did not conspire with him or any other person to do any injury to the property of the Jefferson Standard Broadcasting Company, the Duke Power Company, or any other person.

The jury found the defendant "guilty on both counts set forth in the bill of indictment." The judge decreed that he should be imprisoned as a misdemeant for two years on each count, but stipulated that the two sentences should run concurrently.

The defendant excepted and appealed, assigning as error the rejection of his plea of former acquittal, the refusal of his motions for compulsory nonsuits, various rulings in respect to evidential matters, and numerous portions of the charge.

ATTORNEY-GENERAL McMULLAN AND ASSISTANT ATTORNEY-GENERAL MOODY FOR THE STATE.

RALPH V. KIDD AND J. C. SEDBERRY FOR THE DEFENDANT, APPELLANT.

ERVIN, J. It is an ancient and basic principle of criminal jurisprudence that no one shall be twice put in jeopardy for the same offense. S. v. MANSFIELD, 207 N. C. 233, 176 S.E. 761. Several criteria have been prescribed by the authorities for determining in diverse situations

whether two indictments are for the same offense. The one applicable on the present record is the "same-evidence test," which is somewhat alternative in character. It is simply this: Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first indictment (S. v. FREEMAN, 162 N. C. 594, 77 S.E. 780, 45 L.R.A. (N.S.) 977; S. v. HOOKER, 145 N. C. 581, 59 S.E. 866; S. v. HANKINS, 136 N. C. 621, 48 S.E. 593; S. v. NASH, 86 N. C. 650, 41 Am. Rep. 472; S. v. REVELS, 44 N. C. 200; S. v. BIRMINGHAM, 44 N. C. 120; S. v. JESSE, 20 N. C. 95), or whether the same evidence would support a conviction in each case. S. v. CLEMMONS, 207 N. C. 276, 176 S.E. 760; S. v. BELL, 205 N. C. 225, 171 S.E. 50. See, also, in this connection: 22 C.J.S., Criminal Law, section 279.

Whether the facts alleged in the second indictment, if given in evidence, would have sustained a conviction under the first is always to be determined by the court from an inspection of the two indictments. S. v. NASH, *supra*. Whether the same evidence would support a conviction in each is to be determined by a jury from extrinsic testimony if the plea of former jeopardy avers facts *dehors* the record showing the identity of the offense charged in the first with that set forth in the last indictment. S. v. BELL, *supra*.

When these rules are laid alongside the case at bar, it is clear that the judge rightly refused to submit to the jury the two specific issues tendered by the defendant and rightly rejected the plea of former acquittal. The plea merely set forth the several indictments and the result of the former trial, and drew the legal conclusion from these bare matters that the defendant was being twice put in jeopardy for the same offense. It did not aver any facts *dehors* the record showing the identity of the crimes charged in the former indictments with those described in the present one. These things being true, the plea was insufficient, for it revealed on its face the nonidentity of the several offenses. The defendant's legal standing would not be bettered a whit, however, on this phase of the case

if his plea of former acquittal had gone beyond the record and invoked the extrinsic testimony. This is so because evidence of a conspiracy to damage or injure property owned or used by the Duke Power Company will not support a conviction of a conspiracy to damage or injure property owned or used by the Jefferson Standard Broadcasting Company. S. v. HICKS, *supra;* S. v. CRISP, 188 N. C. 799, 125 S.E. 543.

This brings us to the question whether the trial judge erred in refusing to dismiss the prosecution on compulsory nonsuits under G. S. 15-173.

The defendant was not entitled to have the action nonsuited on the theory that the crime alleged was committed outside the State. While the conspiracy was formed in South Carolina, one of the conspirators, namely, Chesley Morgan Lovell, committed overt acts in Mecklenburg County, North Carolina, in furtherance of the common design. As a consequence, the Superior Court of Mecklenburg County had jurisdiction to try the action. S. v. DAVIS, 203 N. C. 13, 164 S.E. 737; 22 C.J.S., Criminal Law, section 136. In legal contemplation, a criminal conspiracy is continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. 11 Am. Jur., Conspiracy, section 23.

The defendant advances this additional argument in support of his contention that the trial court erred in refusing to nonsuit the action: The four transformers had been converted into realty by annexation to the land, and by reason thereof belonged to the Jefferson Standard Broadcasting Company. Hence, there was a fatal variance between the indictment charging a conspiracy to damage or injure the property of the Duke Power Company, and the proof showing a conspiracy to damage or injure the realty of the Jefferson Standard Broadcasting Company.

This position is untenable. The transformers were not physically annexed to the land. S. v. MARTIN, 141 N. C. 832, 53 S.E. 874. Moreover, they were placed on the land under a contract with the landowner specifying that they

should remain the property of the Duke Power Company. Consequently, the transformers retained the character of personality. R. E. v. DEAL, 90 N. C. 110; FEIMSTER v. JOHNSON, 64 N. C. 259. It necessarily follows that the testimony of the State was sufficient to carry the case to the jury and to support the verdict on the second count, i.e., the count charging a criminal conspiracy to injure the personal property of the Duke Power Company.

There was no evidence at the trial, however, to sustain the verdict on the first count, i.e., the count charging a criminal conspiracy to commit damage and injury upon the real property of the Duke Power Company. Nevertheless, the erroneous submission of the first count to the jury is unavailing to defendant unless he shows error affecting the second count. This is true because the jury convicted the defendant on both counts, and the court imposed upon him equal sentences running concurrently on both counts. S. v. MERRITT, 231 N. C. 59, 55 S.E. 2d 804; S. v. WARREN, 227 N. C. 380, 42 S.E. 2d 350.

A painstaking examination of the remaining exceptions discloses no prejudicial error affecting the second count.

The testimony of the State's chief witness, Chesley Morgan Lovell, that he was serving a sentence for complicity in the affair under investigation was competent to forestall a contention on the part of the defense that he was testifying for the prosecution to obtain personal immunity. The testimony of the State's witness, Frank Turbeyville, a soldier, that he appeared as a witness at the trial in obedience to orders of his military superior was admissible to counteract the imputation made by the defense on his cross-examination that he was there in the capacity of a hired witness.

The prosecution laid a proper foundation for the introduction of Lovell's evidence as to the telephone conversation in which he was informed of the concealment of the dynamite behind the signboard near Jimmy's Cafe. Lovell had heard the defendant talk, and expressed the opinion that the voice heard on the telephone was that of the defendant. Stansbury: North Carolina Evidence, section 129;

U. S. v. EASTERDAY, 57 F. 2d 165. Any lack of assurance on Lovell's part as to the identity of the speaker went to the weight of the evidence and not to its admissibility. Stansbury: North Carolina Evidence, section 96. Moreover, the telephone conversation contained internal evidence that the person at the other end of the line was a party to the criminal conspiracy formed a week before. S. v. STRICKLAND, 229 N. C. 201, 49 S.E. 2d 469. It was proper for the State to introduce in evidence the dynamite which Lovell found at the signboard immediately after the telephone conversation and had in his possession at the time of his apprehension. The testimony indicated that the dynamite was provided by the defendant to enable Lovell to consummate the conspiracy. 22 C.J.S., Criminal Law, section 712. It is not perceived how the defendant suffered any prejudice through the unsuccessful effort of the Solicitor to have the witness Lovell identify the dynamite caps. S. v. COFFEY, 210 N. C. 561, 187 S.E. 754. These articles were not received in evidence.

Since the testimony for the prosecution tended to establish that the ultimate object of the conspiracy was to silence Radio Station WBT, the court rightly received the evidence of the State's witnesses, Fletcher Austin, James B. Patterson, and Alonzo G. Squires, as to antecedent threats of the defendant to injure the Jefferson Standard Broadcasting Company, the owner of the radio station. The same observation applies to the expressions of hostility for the Broadcasting Company contained in the handbill distributed by the defendant and the letter written by him. The threats and expressions of ill will were admissible to show intent and motive. Stansbury: North Carolina Evidence, section 83.

The Solicitor did not transgress legal proprieties in undertaking to impeach the defendant as a witness by cross-examining him as to antecedent acts of misconduct. S. v. KING, 224 N. C. 329, 30 S.E. 2d 230.

The trial judge did not err in his instruction to the jury. When the charge is read contextually, it is manifest that the court instructed the jury accurately on the law of the

case, summed up the evidence of the witnesses correctly, and stated the contentions of the prosecution and defense fairly.

For the reasons given, there is in a legal sense
No error.